1981

State of Utah v. Larry Elliott and William H. Clayton : Appellants' Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF UTAH, STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. LARRY J. ELLIOTT and WILLIAM H. CLAYTON, Defendants-Appellants,	:	APPELLANTS' REPLY BRIEF No. 17350, 17351, 17358

APPELLANTS' REPLY BRIEF

APPEAL FROM JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, COUNTY OF UTAH,
STATE OF UTAH

HONORABLE MAURICE HARDING, JUDGE

THOMAS H. MEANS
67 North 200 East
Provo, Utah 84601

ATTORNEY FOR APPELLANTS

DAVID L. WILKINSON
Utah Attorney General

ROBERT R. WALLACE
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84111

ATTORNEYS FOR RESPONDENT

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APPELLANTS' REPLY BRIEF

NATURE OF THE CASE

Appellants were charged by information, filed on 5 June, 1980, for violating provisions of Section 76-5-405(1)(a)(ii), Utah Code Annotated, 1953, to wit: engaging in a sexual act involving the genitals of one person and the mouth of another, without the consent of the victim, DENNIS FRAZIER, compelling submission to the said sexual act by the threat of death or serious bodily injury to be inflicted imminently on the said DENNIS FRAZIER.

DISPOSITION IN THE LOWER COURT

Appellants were found not guilty of violating Section 76-5-405(1)(a)(ii), but were found guilty of violating Section

76-5-403(2), forcible sodomy, a lesser included offense. Both Appellants were subsequently committed to the Utah State Prison to serve terms of not less than one year nor more than fifteen years.

RELIEF SOUGHT ON APPEAL

Appellants respectfully seek reversal of the lower Court's judgment or, alternatively, an order remanding the case for a new trial.

STATEMENT OF FACTS

Appellants were charged with having violated Section 76-6-405(1)(a)(ii), Utah Code Annotated, 1953. The Trial Court instructed the jury relative to that Section as well as to one lesser included crime, to wit: Section 76-5-403(2), Utah Code Annotated, 1953, Forcible Sodomy. Counsel for Appellant, CLAYTON had submitted a written request for an instruction on Section 76-5-102.5, Utah Code Annotated, 1953, Assault by a Prisoner. The record does not indicate CLAYTON'S counsel objected to the Court's refusal to so instruct. Appellant, ELLIOT'S, counsel made an oral request, in chambers, for instructions on Section 76-5-102, Utah Code Annotated, 1953, Assault, and Section 76-5-103, Utah Code Annotated, 1953, Aggravated Assault. Elliott's counsel did object to the Court's refusal to instruct on those two Sections (See: Minute Entry, "Trial", Page 60 of the Record on Appeal and

Transcript of Trial, Page 237, Line 1.)

The facts relative to the criminal activity involving Appellants and occuring on the night of 4 May, 1980, at the Utah County Jail vary according to which witness one chooses to believe. Those facts are addressed later herein.

ARGUMENTS

POINT I: THIS COURT MAY PROPERLY REVIEW THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON SECTIONS 76-5-102.5, 76-5-102, AND 76-5-103, AS THESE REQUESTS WERE SUBMITTED TO THE TRIAL COURT IN A TIMELY MANNER.

This Court has previously ruled that it may exercise its discretion to review an orally requested instruction. See State v. Bell, 563 P2d 186, (1977). Appellant Elliott's oral request for instructions on Sections 76-5-102 and 76-5-103 were apparently taken in chambers immediately prior to reading the approved instructions to the jury. Elliott's counsel further objected to the Court's refusal to so instruct, in the record. Elliott's request and objections appear to both be timely. It appears from the Minute Entry, "Trial", Page 60 of the Record on Appeal, that discussion also was had on Elliott's request. Appellants' assignment of error to the Trial Court's refusal to instruct on the crimes of Assault and Aggravated Assault is in a proper posture to be reviewed by this Court, at its discretion, pursuant

to Rule 19(c), Utah Rules of Criminal Procedure and Rule 51, U Rules of Civil Procedure.

Appellant Clayton's written request for an instruction on Section 76-5-102.5 was apparently also discussed and argued, i chambers, prior to reading the instructions to the jury, altho the nature and extent of those arguments are nowhere noted in record. Clayton's counsel did not make a record of his object to the Court's refusal to instruct on that section. However, this request was written and in the file of the matter, and subsequently argued for in Chambers, it was certainly brought sufficiently to the attention of the Trial Court in time for i be included in the approved instructions had the Trial Court f it appropriate. Appellants urge, notwithstanding Clayton's failure to make a record of his objection to the refusal to instruct on Section 76-5-102.5, that this Court exercise its discretion and review the refusal to instruct on this Section also.

POINT II: THIS COURT MAY REVIEW THE TRIAL COURT'S REFUSAL TO INSTRUCT ON SECTIONS 76-5-102.5, 76-5-102, AND 76-5-103, AS WELL AS THE TRIAL COURT'S FAILURE TO INSTRUCT ON OTHER NECESSARILY INCLUDED LESSER OFFENSES, AS MANIFEST INJUSTICE WOULD RESULT OTHERWISE

As argued in Appellants' initial Brief to this Court, Rul 19(c), allows this Court to review error assigned to instructi

in order to avoid manifest injustice, notwithstanding a party's failure to object or request specific instructions. Accordingly, if it is necessary to avoid manifest injustice, this Court may review the Trial Court's refusal to instruct on the three offenses listed in Point I, above, even if Appellants' requests and objections are found to be inadequate or non-existent. Likewise, this Court may also review the need for giving instructions on other lesser included offenses argued for in Point III of Appellants' initial Brief and addressed again in Point III, herein.

In its responsive Brief, the State argues that Appellants have not made a showing of the needed manifest injustice. However, in attempting to establish such manifest injustice Appellants are in a "damned if they do - damned if they don't" predicament. They cannot secure this Court's review if they do not make a showing of manifest injustice; but they cannot make a showing of manifest injustice if this Court does not consider the other points in their Appeal.

Appellants contend that manifest injustice resulted when they were denied the right to take their theory of the case to the jury because the Trial Court wrongfully limited the scope of the jury's consideration by wrongfully limiting the number of lesser included crimes in its instructions. This Court must consider whether there were additional lesser included offenses within the greater charge of Aggravated Sexual Assault and whether there was

evidence that could have caused reasonable men to acquit Appellants on the greater charge and convict them on one or mo of the omitted lesser charges before it can rule on the issue manifest injustice.

Further, the crime charged was a felony of the first degr The conviction was for a felony of the second degree. The offenses for which Appellants feel they were entitled to instructions range from a felony of the second degree, to felo of the third degree, down to a class B misdemeanor. The term imprisonment for a felony of the first degree is 5 years to li Section 76-3-203(1), Utah Code Annotated, 1953; the term of imprisonment for a felony of the second degree is 1 to 15 year Section 76-3-203(2), Utah Code Annotated, 1953; the term of imprisonment for a felony of the third degree is not more than years, Section 76-3-203(3), Utah Code Annotated, 1953; the ter imprisonment for a class B misdemeanor is not more than 6 mont Section 76-3-204(2), Utah Code Annotated, 1953. If the Trial Court should have instructed the Jury on other lesser included offenses, then it was manifestly unjust for the Trial Court no do so in light of the immense variance between the term of imprisonment for the offense the Appellants were convicted of the terms of imprisonment for the offenses that the jury shoul have rightfully considered. See again those cases cited in Po II of Appellants initial brief, i.e.: August vs. U.S., 257 F. (1918); State v. Cobo, 60 P2d 592, (1936); State v. Close, 49

287, (1972); State vs. Marks, 602 P2d 1344, (1979); State vs. Baker, 617 P2d 39, (1980).

If this Court finds that other lesser included offenses should have been considered by Appellants' jury then this Court should also find that manifest injustice resulted - Appellants were denied their vital right to take their theory of the case to the jury in a setting of a grave and serious charged offense and convictions of long terms of imprisonment.

POINT III: FORCIBLE SODOMY IS NOT THE ONLY POSSIBLE LESSER INCLUDED OFFENSE WITHIN AGGRAVATED SEXUAL ASSAULT.

Appellants agree that State vs. Brennan, states the rule in determining lesser included offenses:

> ...The greater offense includes a lesser one when establishment of the greater would necessarily include proof of all the elements necessary to prove the lesser. State vs. Brennan, 371 P2d 27, (1962).

The elements of Aggravated Sexual Assault, as charged in the Information are:

1) Engaging in a sexual act;
2) Involving the genitals of one person and the mouth of another;
3) Without the consent of the victim;
4) Compelling submission to said sexual act by the threat of death or serious bodily injury;
5) To be inflicted imminently;
6) On said victim. (See: Nature of The Case, herein)

Respondent has conceded that Forcible Sodomy, Section 76-5-403(2), Utah Code Annotated, 1953, is a necessarily lesse included offense within Aggravated Sexual Assault, (See Page 6 Brief of Respondent). Likewise Respondent has conceded that Attempted Forcible Sodomy, is a lesser included offense within Aggravated Sexual Assault, (see Page 15 of Brief of Respondent

Assault, Section 76-5-102, Utah Code Annotated, 1953, a c B misdemeanor, is also a lesser included offense within Aggrav Sexual Assault. Assault can be defined as a threat to do bodi injury to another, accompanied by a show of immediate force or violence. To establish Aggravated Sexual Assault, one must pro a threat of death or serious bodily injury to another. Proof o that element necessarily includes proof of a threat to do bodil injury to another - an element of Assault. Similarly establishment of the element that the actor threatens imminent injury or death is part of the proof of Aggravated Sexual Assau Proof of that element necessarily includes proof of a show of immediate force or violence - an element of assault. Admittedl the wording is different but the meaning is the same. In orde for an actor to threaten imminent injury he must accompany his threat with a show of immediate force or violence. One might t threateningly, but his words alone cannot portend imminent inju without a concomitant showing of his ability to muster immedia force or violence. Aggravated Sexual Assault is just what the name implies - an assault, primarily, with sexual motivations o

goals, aggravated by threats or infliction of serious injury or death. As such, simply assault is necessarily included within the greater prohibited act.

Aggravated Assault, Section 76-5-103, Utah Code Annotated, 1953, a felony in the third degree, is also a lesser offense within Aggravated Sexual Assault. An aggravated assault is an assault accompanied by the use of a deadly weapon or such means or force likely to produce death or serious bodily injury. Again, proof of a threat to do bodily injury is necessarily accomplished by establishing a threat of death or serious bodily injury; and proof of a show of immediate force or violence is necessarily accomplished by establishing a threat to inflict that injury imminently on one's victim. Further, proof of the use of a deadly weapon or such means or force likely to produce death or serious bodily injury is necessarily accomplished in establishing a threat to inflict death or serious bodily injury imminently on one's victim. One must prove that a deadly weapon or force was used in order to establish a threat of imminent death or serious bodily injury. Words, alone, make for hollow threats; use of a deadly weapon or force is necessary to establish the imminent quality of the threat. One cannot threaten imminent death or serious bodily injury without exhibiting the immediate capability to inflict death or serious bodily injury; and one cannot exhibit the immediate capability to inflict death or serious bodily injury without using a deadly weapon or means or force likely to produce

death or serious bodily injury.

Respondent asserts that Aggravated Assault by a Prisoner, Section 76-5-103.5, Utah Code Annotated, 1953, cannot be a les included offense within Aggravated Sexual Assault as both offe are made felonies of the second degree by statute. Appellants disagree. Aggravated Sexual Assault carries the penalty of a felony of the first degree; see Section 76-5-405(2), Utah Code Annotated, 1953.

Respondent does make a creditable point when it asserts t both Assault by a Prisoner, Section 76-5-102.5, Utah Code Annotated, 1953, and Aggravated Assault by a Prisoner, Section 76-5-103.5, Utah Code Annotated, 1953, are not lesser included offenses within the charged offense by reason of the additional element of the actor's status as a prisoner. Appellants, howeve assert that the status of the actor is germain only to sentenci and that both of these offenses are lesser included offenses within Aggravated Sexual Assault for the same reasons as Assaul and Aggravated Assault.

Appellants concede here that Respondent has prevailed in argument that Forcible Sexual Abuse, Section 76-5-404, is not a lesser included offense in this case.

It is urged that the offenses of Attempted Forcible Sodomy Assault, Aggravated Asssault, Assault by a Prisoner, and Aggravated Assault by a Prisoner are necessarily lesser include offenses within Aggravated Sexual Assault.

POINT IV: EVIDENCE ADMITTED AT APPELLANTS' TRIAL ESTABLISHED A RATIONAL BASIS FOR A FINDING THAT APPELLANTS WERE NOT GUILTY OF THE CHARGED GREATER OFFENSE OF AGGRAVATED SEXUAL ASSAULT BUT WERE GUILTY OF ONE OR MORE OF THE FOLLOWING LESSER INCLUDED OFFENSES: ATTEMPTED FORCIBLE SODOMY, ASSAULT, AGGRAVATED ASSAULT, ASSAULT BY A PRISONER, AGGRAVATED ASSAULT BY A PRISONER.

Appellants agree with Respondent that the rule for instructing the jury on lesser included offenses is codified in Section 76-1-402(4), Utah Code Annotated, 1953:

> "The Court shall not be obligated to charge the jury with respect to included offenses unless there is a rational basis for a verdict acquitting the Defendant of the offense charged and convicting him of the included offense."

Respondent correctly points out that the above statute is worded in the conjunctive sense. There must be both a rational basis to acquit on the greater charge and a rational basis to convict on the lesser. But Respondent incorrectly asserts that in this case none of the lesser offenses should have been charged as the evidence could not support a conviction on any of them.

This Court's test for a rational basis to instruct on lesser included offense has been stated and affirmed many times:

> "The well established general rule, that the jury should be instructed on lesser included offenses when such a conviction would be warranted by any reasonable view of the evidence, is in accord with and supported by our Statutory Law." (Emphasis added.) State vs. Close, supra.

See also: State v. Johnson, 185 p2d 738, (1947); State vs. Castillo, 457 P2d 618, (1969); State vs. Gillian, 463 P2d 811, (1970); State vs. Bell, Supra; State vs. Torres, 619 P2d 694, (1980); State vs. Dougherty, 550 P2d 175, (1976). Other jurisdictions have ruled similarly: Stevenson vs. United Stat 16 S.CT. 839, (1896); Bowers vs. People, 617 P2d 560, (1980); People vs. Glenn, 615 P2d 700, (1980); State vs. Jimerson, 618 1027, (1980).

This Court has also stated the same rule in the negative instructions on lesser offenses must be given unless there is evidence tending to reduce the greater offense. See: State vs. Ferguson, 279 P.55, (1929) and State vs. Chestnut, 621 P2d 122 (1980).

This Court has also formulated a settled method for apply the above-cited rule:

> "The usual rule on an appeal in which the challenge is to the sufficiency of the evidence to support the verdict is that we review the record in the light favorable to the jury's verdict. However, in this situation where the question raised relates to the refusal to submit included offenses, it is our duty to survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein which would support a conviction of the lesser offense." Gillian, su

Respondent has likened this case to the situation which occured in Dougherty, supra. There Defendant-Appellant claime complete innocence. He claimed to have been an unwitting part the sale of marijuana. This Court rightfully refused to find

error in the refusal to give an instruction on the lesser included offense of Possession of a Controlled Substance. Dougherty had not shown any evidence to support a conviction on the lesser offense. All of his evidence pointed to either guilt of the greater offense or complete innocence.

But in reviewing the entire transcript in this case, in the attitude required by Gillian, supra, this Court will find that, unlike the Defendant in Dougherty, neither Appellant held himself out as blameless. Rather this Court will find substantial evidence was admitted from which reasonable men could have formed both a rational basis to acquit Appellants on the greater charge and a rational basis to convict Appellants on one or more of the lesser offenses.

Defendant, Elliott's witness, Carl William Howe, testified he had not seen either Appellant perform or attempt to perform sodomy on the victim on the date in question, although he did observe activity which the jury might have considered an assault had they been so instructed; page 144, line 17, through page 147, line 11; page 150, line 1 through page 151, line 30.

Appellant Clayton told the Jury he slapped and punched the victim but denied threatening him with death or serious bodily injury and further denied attempting sodomy on the victim: page 157, line 26 through page 160, line 23; page 161, line 21 through page 161, line 28; page 163, line 20 through page 164, line 29; page 165, line 12 through page 170, line 13; page 172, line 15

through page 173, line 7.

Appellant Elliott also repeatedly admitted assaulting the victim yet denied making threats of death or serious bodily i or making attempts at sodomy on the victim: page 175, line 24 through page 183, line 12; page 184, line 7 through page 187, 12.

One reasonable view of the above testimony is that Appell did not commit nor attempt to commit sodomy on their victim. Another reasonable view is that they did not threaten to infli their victim with imminent death or serious bodily injury, erg Aggravated Sexual Assault was committed.

On the other hand, it is reasonable to view that same evidence as warranting a finding that Appellants did commit an assault upon their victim - that they attempted, with unlawful force or violence, to do bodily injury or that they threatened do bodily injury while exhibiting immediate force or violence.

Reasonable men could have found that the above evidence indicated a force likely to produce serious bodily injury was used but that Appellants did not attempt sodomy. Such action would be Aggravated Assault.

Reasonable jurists could have also concluded that the Appellants, without threatening death or serious bodily injury, attempted to force sodomy on their victim but did not succeed. That would constitute Attempted Forcible Sodomy.

Certainly, there are reasonable views of the foregoing

evidence that would warrant a conviction on one or more of the lesser included offenses. There is also a reasonable view of the evidence that would warrant acquittal on the greater charged offense (the jury did subscribe to that view). But, by submitting only three possible verdicts to the jury, the Trial Court precluded any findings that reflected rational beliefs that Appellants were guilty of Attempted Forcible Sodomy or Assault or Aggravated Assault.

Respondent has stated the jury "must" have been convinced Appellants committed sodomy because they returned a verdict marked guilty on Forcible Sodomy. That is not necessarily so. The jury may have been convinced "a" crime was committed but they may have reached their verdict not by choosing the lesser included offense they believed in but by choosing the lesser of two evils. The Trial Court's instructions, in effect, limited the jury to a consideration of only a part of the evidence. As this Court has held:

> "It is always a delicate matter for a trial court to withhold from the jury the right to find accused guilty of a lesser or included offense and determine the question of the state of the evidence as a matter of law. That should be done only in clear cases." State vs. Hyams, 230 P. 349, (1924).

CONCLUSIONS

In light of the charged offense and the factual setting in this case, there were more lesser included offenses than Forcible

Sodomy. A reasonable viewing of the evidence admitted at the trial of this matter would warrant an acquittal of the charged offense and at the same time convictions on one or more of the lesser included offenses. This Court should review the Trial Court's failure to instruct on the various lesser included offenses less manifest injustice result. This Court should the reverse the Judgment of the lower Court or remand this case for new trial in order that Appellants may have a jury consider all the necessarily lesser included offenses that are appropriate.